NO. 49912-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RANDY RICHTER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

Cowlitz County Cause No. 13-1-01133-3

The Honorable Michael H. Evans Judge

BRIEF OF APPELLANT

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> **ISSUE 1:** A defense attorney provides ineffective assistance of counsel by failing to give his/her client all of the information s/he needs to make a voluntary decision regarding whether to accept or reject a plea offer from the state. Did Mr. Richter's attorney provide ineffective assistance by telling him during plea negotiations that his maximum sentence was ten years in prison when it was actually twenty years, which led Mr. Richter to reject the state's offer for 84 months?

13. The trial court abused its discretion by failing to hold a "factual hearing," as required by CrR 7.8.

> **ISSUE 2:** CrR 7.8 requires the superior court to hold a "factual hearing" when necessary to the resolution of the motion. Did the court err by deciding Mr. Richter's CrR 7.8 motion based

solely on review of the written affidavits when those affidavits contained contradictory information and provided no basis for a meaningful credibility determination?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Randy Richter was convicted of four counts of violation of the Controlled Substances Act following a jury trial in May 2014. CP 170. Mr. Richter appealed his convictions and his case was remanded for resentencing. CP 67-89. Mr. Richter had different counsel at the resentencing hearing than he had had during the trial phase of his case. *See* CP 125-26.

His new sentence (like his original one) was an exceptional sentence imposed by the judge based on the conclusion that his high offender score would cause some current offenses to go unpunished if he was sentenced within the standard range. CP 175, 180. The sentencing court also relied on the "doubling provision" at RCW 69.50.408 to sentence Mr. Richter to sixteen years in prison even though the statutory maximum term for each of his offenses was ten years. *See* RP 370; CP 175.

Mr. Richter filed a Motion for Relief from Judgment under CrR 7.8. CP 125.

In an affidavit attached to the motion, Mr. Richter averred that his trial attorney, Bruce Hanify, had never informed him that he faced the possibility of an exceptional sentence. CP 126. Instead, he had believed

that the highest sentence he could receive was the statutory maximum of ten years in prison. CP 126. Mr. Richter turned down a plea offer for seven and a half years because it was not significantly lower than what he believed to be the longest possible sentence. CP 126.

Mr. Richter did not understand how he had received such a high sentence until he discussed his case with his new attorney prior to his resentencing. CP 126. He swore in his affidavit that he would never have turned down the plea offer if he had understood that he could have received an exceptional sentence above ten years. CP 126.

In response, the state filed a declaration from Hanify. CP 163. Hanify admitted that he could not recall whether he had explained the "doubling statute" to Mr. Richter. CP 163. Hanify said that he told Mr. Richter that the maximum prison term for each of his four charges was ten years. RP 163.

Nonetheless, Hanify claimed that he told Mr. Richter more than once that he should not expect a sentence of less than twenty years. RP 163.[1] Hanify did not claim that he ever explained to Mr. Richter how that

[1] Hanify also stated in his declaration that "It would be completely unrealistic to expect any sentence of less than 20 years. In fact, one might well be sentenced to 40 years or more, depending on different factors (Pre-Conover)." CP 163. But Hanify did not claim to have ever expressed that sentiment to Mr. Richter. CP 163.

would be possible given the statutory maximum term of ten years. CP 163.

Hanify also did not explain *when* he made those statements to Mr. Righter or whether the discussion occurred while the state's plea offer was still on the table. CP 163.

The court did not take any evidence at the hearing on Mr. Richter's motion. RP 388-408. Rather, the court simply heard cursory arguments from the attorneys and then made a decision based solely on Mr. Richter's affidavit and Hanify's declaration. RP 388-408.

The court found that Mr. Richter's CrR 7.8 motion was timely. CP 209. But the court denied the motion, finding that Hanify conveyed to Mr. Richter that he faced the potential of a twenty-year sentence. CP 209.

The court's findings are silent regarding whether Hanify gave that information to Mr. Richter during plea negotiations or at a later time. CP 207-210.

This timely appeal follows. CP 211.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. RICHTER'S CrR 7.8 MOTION BECAUSE HIS TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADVISE HIM OF THE CONSEQUENCES OF REJECTING THE STATE'S PLEA OFFER.

CrR 7.8 permits a party to a criminal case to move the trial court for relief from judgment based on ineffective assistance of counsel during the underlying proceedings. *See* CrR 7.8 (permitting a motion based, *inter alia*, on "[a]ny other reason justifying relief from the operation of the judgment); *State v. Martinez,* 161 Wn. App. 436, 440-41, 253 P.3d 445 (2011) (holding that ineffective assistance of counsel justifies relief under CrR 7.8).

Denial of a CrR 7.8 motion is reviewed for abuse of discretion. *Martinez,* 161 Wn. App. at 440. A court abuses its discretion by making a decision based on untenable or unreasonable grounds. *Id.*

Both the state and federal constitutions protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22. That right extends to the assistance of counsel during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012);

see also Missouri v. Frye, 566 U.S. 133, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012); *State v. Estes*, --- Wn.2d ---, 395 P.3d 1045, 1049 (June 8, 2017).[2]

In order to demonstrate ineffective assistance of counsel, the accused must show both deficient performance and prejudice. *Estes*, 395 P.3d at 1049. Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability[3] that it affected the outcome of the proceedings. *Id.*

Competent defense counsel "assists the accused in making an informed decision as to whether to plead guilty or to proceed to trial." *Id.* (*Citing State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010)). Accordingly, defense counsel provides deficient performance by failing to inform his/her client of information necessary to make an informed decision during plea negotiations. *Id.*; *Lafler*, 566 U.S. 156; *Martinez*, 161 Wn. App. 436.

An accused person's rejection of a plea offer is not voluntary if s/he does not understand the consequences of rejecting the offer and going to trial because defense counsel has not informed him/her of the sentence

[2] Ineffective assistance of counsel claims are reviewed *de novo*. *Estes*, 395 P.3d at 1049.

[3] A "reasonable probability" under the prejudice standard is lower than the preponderance of the evidence standard. *Estes*, 395 P.3d at 1049. Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*

s/he could receive following trial. *In re McCready*, 100 Wn. App. 259, 263, 996 P.2d 658 (2000) (defense counsel provided ineffective assistance by failing to explain 10-year mandatory minimum sentence to client during plea negotiations).

Mr. Richter received an exceptional sentence under RCW 9.94A.535(2)(c) under the "free crimes doctrine" based on his high offender score. CP 175, 180.

Each of Mr. Richter's charges was a class B felony. CP 170. Accordingly, his maximum possible sentence would normally have been ten years. RCW 9A.20.021(1)(b); *See also State v. Barbee*, 187 Wn.2d 375, 392, 386 P.3d 729 (2017), *as amended* (Jan. 26, 2017) (maximum possible exceptional sentence for a class B felony is 120 months). RCW 69.50.408, however, provides for that statutory maximum to be doubled in the case of subsequent convictions for drug offenses.[4]

In Mr. Richter's case, Hanify provided ineffective assistance of counsel by failing to explain the possibility of an exceptional sentence beyond the statutory maximum term of ten years for class B felonies.

Hanify says in his declaration that had does not recall discussing the "doubling statute" at RCW 69.50.408 with Mr. Richter. CP 163.

[4] The sentencing court could also, theoretically, have run the sentences for each of Mr. Richter's offenses consecutively to one another. But it chose not to do so in Mr. Richter's case.

Without that statute, however, the court would not have been able to sentence Mr. Richter to more than the ten-year statutory maximum prison term for his class B felony charges.

In fact, Hanify does not mention in his declaration whether he ever discussed the possibility of an exceptional sentence with Mr. Richter at all. CP 163. Specifically, he does not explain whether he ever told Mr. Richter that the judge could impose an exceptional sentence based on his high offender score even absent a factual jury determination of aggravating factors.

Hanify's declaration is, at best, internally-inconsistent. He claims that he told Mr. Richter that the maximum term for his offenses was ten years but also that he should expect a twenty-year sentence. CP 163. Absent some clarifying explanation, that contradictory information is not competent advice permitting Mr. Richter to make a voluntary decision to reject the state's plea offer.

The court relied in its findings of fact on the contention that Mr. Richter's high offender score indicates that he has some familiarity with the criminal justice system. CP 209. In this instance, however, general familiarity could actually have added to Mr. Richter's misunderstanding.

For example, general knowledge of *Blakely*[5] could have led Mr. Richter to conclude that he could not be given an exceptional sentence absent special factual findings by the jury. General knowledge of exceptional sentences could have led him to believe that he could not be sentenced above the statutory maximum term. Even Mr. Richter's considerable experience could not have assisted him in making an informed decision in this case absent competent advice from defense counsel. As such, even accused persons with experience in the criminal justice system are guaranteed the right to competent counsel during plea negotiations.

Critically, Hanify also does not clarify in his declaration *when* he told Mr. Richter that he could expect a twenty-year (or more) sentence in his case.[6] CP 163. The information would only have been helpful to Mr.

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[5] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

[6] The closest Hanify's declaration comes to providing any sort of timeline is in the following passage:

> Mr. Richter was shown and we discussed the prosecution's offer of 84 months on multiple occasions. He was told on several occasions that a post-trial sentence commensurate with the prosecution's offer of 84 months was not possible following a trial, except under the most extraordinary circumstances, none of which seemed plausible to me.
>
> CP 163.

But Hanify does not clarify what would have constituted a "post-trial sentence commensurate with the prosecution's offer of 84 months." Mr. Richter likely reasonably understood that a ten-year sentence (which he believed to be the statutory maximum) would not have been "commensurate." Hanify does not claim to have given Mr. Richter any other information during the plea negotiation phase of his case.

Richter's decision during plea negotiations if it was provided while the state's offer was still on the table. Absent specification regarding the timeline, Hanify's claims regarding what he told Mr. Richter are inapposite to whether he provided effective assistance *during plea negotiations*.

Hanify did not give Mr. Ricther the information he needed to make an informed decision regarding whether to accept the state's plea offer. He provided deficient performance. *Lafler*, 566 U.S. 156; *Estes*, 395 P.3d at 1049; *Martinez*, 161 Wn. App. 436; *McCready*, 100 Wn. App. at 263.

An accused person is prejudiced by defense counsel's deficient performance during plea negotiations if it causes him/her to reject a plea offer that would have led to a more favorable sentence than the one imposed after trial. *Lafler*, 566 U.S. at 163-64.

Mr. Richter presented an affidavit averring that he would have accepted the state's offer if he had known that the statutory maximum for his offenses was actually twenty years instead of ten. CP 126. The state did not present any evidence contradicting that claim. His sentence (following resentencing) was for sixteen years. CP 175. Mr. Richter was prejudiced by his attorney's deficient performance. *Id.*

The remedy for ineffective assistance of counsel that leads an accused person to reject a favorable plea is to order the state to reoffer the

plea deal. *Id.* at 171. Accordingly, this court should remand Mr. Richter's case with an order requiring the prosecution to reoffer the chance for him to plead guilty with the original sentencing recommendation. *Id.*

Mr. Richter's defense attorney provided ineffective assistance of counsel by failing to give Mr. Richter the information he needed to make a voluntary decision to turn down the state's plea offer. *Lafler*, 566 U.S. 156; *Estes*, 395 P.3d at 1049; *Martinez*, 161 Wn. App. 436; *McCready*, 100 Wn. App. at 263. The court's order denying Mr. Richter's CrR 7.8 motion must be reversed. *Id.*

II. THE TRIAL COURT MIS-APPLIED CrR 7.8 BY FAILING TO HOLD A "FACTUAL HEARING" BEFORE DENYING MR. RICHTER'S MOTION.

The superior court did not take any evidence or swear in any witnesses at the hearing on Mr. Richter's CrR 7.8 motion. RP 388-408. Instead, the court made a decision based solely on the written affidavits, which contradicted one another on the key factual issues. CP 207-210. The court erred by failing to hold a "factual hearing," as required by the rule. CrR 7.8(c)(2).

CrR 7.8 provides a trial court with two options. If the court determines that the motion is time barred by RCW 10.73.090, then it must be transferred to the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2).

If, on the other hand, the court decides that the motion is timely and that (i) "the defendant has made a substantial showing that he or she is entitled to relief" or (ii) the motion would require a "factual hearing" for proper resolution, the court should retain the motion and order the prosecution to "show cause why the relief asked for should not be granted." CrR 7.8(c); *See also State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008) (detailing the procedure).

Put another way: "… if the motion is timely and appears to have merit or requires a fact finding, [] the superior court [should] retain and hear it. *State v. Robinson*, 193 Wn. App. 215, 218, 374 P.3d 175 (2016).

If the court retains the motion, it must hold a hearing. CrR 7.8(c)(3).

Court rules are interpreted using the same rules as those for statutory construction. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). Accordingly, a court rule must be construed viewing the text as a whole "in terms of the general object and purpose" of its drafter. *Boss v. Washington State Dep't of Transp.*, 113 Wn. App. 543, 551, 54 P.3d 207 (2002).

CrR 7.8 does not clarify the nature of the "hearing" that must take place in superior court if the court decides to retain the motion. *See* CrR

7.8. The rule does specify, however, that the court must hold a "factual hearing," if necessary for resolution of the motion. CrR 7.8(c)(2).

If the court found that Hanify's declaration was sufficient to establish that he provided competent advice to Mr. Richer during the plea negotiations phase[7], then the court was faced with contradictory evidence and no meaningful way to make a credibility determination regarding whom to believe.

When read as a whole, CrR 7.8 anticipates a "factual hearing" involving more than a mere review of the affidavits. Indeed, if the drafters of the rule had intended the decision to be made solely on the basis of the written filings, then there would be no meaningful difference between a case retained by the superior court and one transferred to the Court of Appeals.

The hearing in Mr. Richter's case, at which the court made a decision based solely on Mr. Ricther's affidavit and Hanify's declaration, was not a "factual hearing" as anticipated by CrR 7.8. The court did not swear in any witnesses or admit any evidence. The court did not do anything differently from what the Court of Appeals would have done if the case had been transferred as a personal restraint petition.

[7] As outlined above, Hanify's declaration was not actually sufficient to demonstrate that he had provided competent advice.

If this Court finds that Hanify's declaration is ambiguous or that Mr. Richter cannot meet his burden to demonstrate ineffective assistance given the possible contradictory information in his affidavit and Hanify's declaration, then this court should remand the case and order the superior court to hold a "factual hearing" at which it takes evidence to determine what (if any) information Hanify provided Mr. Richter regarding his potential sentence at the time of his plea negotiations.

The superior court erred and violated CrR 7.8 by failing to hold a "factual hearing" on Mr. Richter's motion. The ruling denying his motion must be reversed.

CONCLUSION

Mr. Richter was denied his constitutional right to the effective assistance of counsel when his defense attorney did not provide him with the information he needed to make a voluntary decision about whether to accept the state's plea offer. This Court must reverse the order denying his CrR 7.8 motion and remand his case with an order requiring the state to reoffer the original plea deal.

In the alternative, the trial court erred by failing to hold a "factual hearing" to determine whether defense counsel had provided deficient

performance. Mr. Richter's case must be remanded for a fact-finding hearing on his motion.

Respectfully submitted on July 19, 2017,

Skylar T. Brett, WSBA No. 45475
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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Randy Richter/DOC#812747
Clallam Bay Corrections Center
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on July 19, 2017.

_____

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